DOMINIC PUTHUCHEARY & ORS

v.

DR GOON SIEW FONG & ANOR

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
SURIYADI HALIM OMAR JCA
HASAN LAH JCA
[CIVIL APPEAL NO: W-01-118-1996]
25 JULY 2007

TORT: *Negligence - Hospital - Professional negligence - Action by plaintiffs against defendants for negligently causing death of deceased - Vicarious liability - Whether causation established*

This was an appeal by the plaintiffs, the deceased's personal representatives, against the decision of the High Court dismissing their action against the defendants for negligently causing the death of the deceased. The plaintiffs' case against the first defendant was as follows. On the deceased's arrival at the Casualty Department of the Kuala Lumpur General Hospital, the first defendant did not adequately examine him. She was careless in not diagnosing him as a case of spinal injury and in failing to give the necessary instructions for his management. She should have treated the deceased for hypovolaemic shock. Her negligent omissions in these respects caused the deceased to suffer a cardio respiratory arrest and then his death. The plaintiffs' case against the second defendant was premised on two grounds. First, that upon a finding of negligence against the first defendant, the second defendant was vicariously liable as her employer. Second, on the facts, the second defendant was guilty of negligence in not providing any adequate or competent medical care for the management and treatment of the deceased. Further, it had in operation, the existence of a negligent system of medical care and attention in the Casualty Department of the hospital. The two questions requiring determination were: (i) whether either or both the defendants were negligent; and (ii) even if either or both were, then, whether their negligence caused the deceased's death.

Held (dismissing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) Central to the plaintiffs' case was the charge that the first defendant ought reasonably to have suspected a spinal injury and directed treatment accordingly. Now, to arrive at that point it must first be established by evidence that the deceased did suffer a spinal injury. But there was not a jot of evidence that established the point. It was a merely a theory advanced by the plaintiffs. Instead, the plaintiffs attacked the theory advanced by the defendants as to the likely cause of the deceased's death seeking thereby to show that their charge of negligence must be correct. That, however, was insufficient. Additionally, there was evidence on record to show that the deceased, on admission, found it painful to move one of his legs. The evidence of one Dato' Dr. Rani Jusuh, a neurologist and Head of the second defendant's Department of Neurology, was that the first defendant did conduct an examination of the central nervous system. Even if the evidence of the witnesses produced by the defendants was to be looked upon with suspicion, the plaintiffs' case on negligence as against the first defendant remained unproved. (paras 6 & 7)

(2) As in the case against the first defendant, the plaintiffs' case against the second defendant must, to succeed, depend upon proof of causation. Taking into account all the relevant facts and giving them the maximum weight they deserve, the plaintiffs still fell short of establishing that the negligence – if any – on the part of the second defendant caused the deceased's death. (para 10)

(3) Like the plaintiff in *Wilsher v. Essex Area Health Authority*, the plaintiffs here had clearly failed to establish causation. *Wilsher* did differ from the present case in one respect in that there was a sharp conflict in the medical evidence in that case whereas in the present case, that element was lacking. There was simply no evidence of a spinal injury. In *Wilshire*, there was evidence of excessive oxygen having been administered and of injury to the eye. Here, the plaintiffs' medical evidence put at its highest merely rendered uncertain the proximate cause of the deceased's death. (para 15)

Bahasa Malaysia *translation of headnotes*

Ini adalah rayuan plaintif-plaintif, wakil-wakil diri si mati, terhadap keputusan Mahkamah Tinggi kerana menolak tuntutan mereka terhadap defendan-defendan kerana menyebabkan kematian si mati dengan cuai. Kes plaintif-plaintif terhadap defendan pertama adalah seperti berikut. Semasa si mati tiba di Jabatan Kasualti, Hospital Besar Kuala Lumpur, defendan pertama gagal memeriksa si mati dengan secukupnya. Defendan pertama dikatakan cuai kerana tidak mendiagnosakan keadaan si mati sebagai satu kes kecederaan tulang belakang dan kerana tidak memberi arahan-arahan wajar untuk rawatannya. Beliau sepatutnya merawat si mati untuk 'hypovolaemic shock'. Dikatakan seterusnya bahawa kecuaian beliau itu telah menyebabkan si mati mengalami 'cardio respiratory arrest' dan menemui ajalnya. Kes plaintif-plaintiff terhadap defendan kedua adalah berasaskan kepada dua perkara. Pertama, bahawa atas dapatan kecuaian terhadap defendan pertama, defendan kedua selaku majikan adalah bertanggungan secara vikarius. Kedua, berdasarkan fakta, defendan kedua berlaku cuai kerana gagal memberikan layanan perubatan yang mencukupi dan berkompeten semasa merawat dan menjaga si mati. Selain itu, defendan kedua juga dikatakan melaksanakan suatu sistem rawatan dan jagaan perubatan yang cuai di Jabatan Kasualti hospitalnya. Dua persoalan yang menuntut keputusan adalah: (i) sama ada salah satu atau kedua-dua defendan cuai; dan (ii) jika begitu, sama ada kecuaian tersebut menyebabkan kematian si mati.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Teras kes plaintif-plaintif adalah dakwaan bahawa defendan pertama secara munasabahnya patut dapat mengesyakki kecederaan pada tulang belakang dan mengarahkan rawatan yang sewajarnya. Namun, untuk sampai ke peringkat itu, ia harus terlebih dahulu dibuktikan melalui keterangan bahawa si mati sebenarnya mengalami kecederaan tulang belakang. Hakikatnya, tidak ada setitik bukti yang menunjukkan itu. Ia hanyalah satu teori yang dikemukakan oleh plaintif-plaintif. Sebaliknya, plaintif-plaintif telah menyanggah teori yang dikemukakan defendan-defendan mengenai sebab-musabab yang mungkin menyebabkan kematian, dengan hasrat untuk menunjukkan bahawa dakwaan mereka tentang kecuaian defendan-defendan semestinyalah benar. Itu malangnya adalah

A tidak memadai. Selain itu, terdapat keterangan pada rekod yang menunjukkan bahawa si mati, semasa dimasukkan, merasa sakit untuk menggerakkan sebelah kakinya. Keterangan Dato' Dr. Rani Jusuh, pakar neurologi dan Ketua Jabatan Neurologi hospital defendan, adalah bahawa defendan pertama ada
B melakukan pemeriksaan terhadap sistem saraf tunjang. Oleh itu, jikapun keterangan yang dikemukakan oleh saksi defendan-defendan harus dilihat dengan penuh hati-hati, kes kecuaian plaintif-plaintif terhadap defendan pertama masih tetap tidak terbukti.

C

(2) Sepertimana dalam kes terhadap defendan pertama, untuk berjaya, kes plaintif terhadap defendan kedua perlu bergantung kepada bukti sebab-musabab. Mengambilkira semua fakta relevan dan memberikannya penilaian yang maksima, plaintif-
D plaintif masih gagal membuktikan bahawa kecuaian – jikapun wujud di pihak defendan kedua – telah menyebabkan kematian si mati.

(3) Seperti plaintif di dalam *Wilsher v. Essex Area Health Authority*,
E plaintif di sini jelas gagal membuktikan sebab-musabab (causation). *Wilsher* berbeza dari kes di sini dari satu segi, iaitu terdapat konflik keterangan yang runcing di dalam kes tersebut yang mana ianya tidak wujud dalam kes di sini. Tidak ada sama sekali keterangan mengenai kecederaan tulang belakang.
F Di dalam *Wilshire*, terdapat keterangan tentang pemberian oksigen yang berlebihan dan kecederaan pada mata. Di sini, keterangan perubatan plaintif-plaintif, pada tahapnya yang tertinggi pun, hanya menunjukkan ketidakpastian mengenai sebab-sebab kematian si mati.

G **Case(s) referred to:**
Foo Fiona v. Dr Eddie Soo [2007] 1 CLJ 229 FC ***(refd)***
McGhee v. National Coal Board [1972] 3 All ER 1008 ***(refd)***
Wilsher v. Essex Area Health Authority [1988] 1 All ER 860 ***(refd)***

For the appellants - Vinayak Pradhan; M/s Skrine
H *For the respondents - Alice Loke Yee Ching (Seri Emelliawaty with her)*

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S5-25-174-1987]

Reported by Suresh Nathan

I

JUDGMENT

Gopal Sri Ram JCA:

[1] K Thayalan was an advocate of these courts. He died in tragic circumstances. His personal representatives place the blame for his death on the defendants. They say that it is the defendants' who negligently caused his death. The High Court did not agree with them. It dismissed their action. They now appeal to us.

[2] The relevant facts are these. On 3 April 1984, at about 5.30am, PW3, a security guard found the deceased in a drain at the Lake Gardens. The deceased had a pain in his neck and his arms. He told PW3 about it. He was unable to climb out of the drain. He was unable to move his legs. PW3, with the help of some of his friends carried the deceased out of the drain. They placed him on the ground near the drain. An ambulance was sent for. It arrived. It took the deceased to the Kuala Lumpur General Hospital. He arrived on a stretcher and was taken to the Casualty Department. The first defendant examined him there. This was at about 6.45am. An intravenous drip was administered, the wound on the deceased's head was bandaged and he was sent to have x-rays taken. There was considerable delay in the taking of the x-rays. By about 8.30am the deceased's pulse could not be felt. He was then taken to the neurology department where, despite efforts by the attending doctors, he died at about 10am, that is to say, less than three hours after he arrived at Casualty.

[3] Two questions presented themselves for decision to the learned judge. First, whether either or both defendants were negligent. Second, even if either or both were, then, whether their negligence caused the deceased's death. The High Court appears to have found for the defendants on both points and dismissed the plaintiffs' claim. I say "appears" advisedly because no written reasons were ever produced by the learned judge for his decision. This has resulted in my learned brothers and I having to trawl through evidence on record and subject it to an examination afresh. Since the facts in relation to both issues – negligence and causation – are intertwined, I find it convenient to take them together.

[4] The plaintiffs' case against the first defendant is this. On the deceased's arrival at Casualty, the first defendant did not adequately examine him. She was careless in not diagnosing him as a case of spinal injury. She was also careless in failing to give the necessary instructions for his management. She should have treated the deceased for hypovolaemic shock. Her negligent omissions in these respects caused the deceased to suffer a cardio respiratory arrest and then his death. The defendants' complain that the plaintiffs' case as argued raises an unpleaded charge of negligence. With respect, I do not agree. The submissions made to us, both oral and written merely summarise the pleaded particulars which allege that the first defendant:

(i) failed to carry out tests on the deceased's central nervous system;

(ii) failed to detect and/or diagnose an injury to the deceased's spinal cord;

(iii) failed to administer the correct medication and/or amount of medication in treating hypovolaemic shock suffered by the deceased;

(iv) failed to take precautions and/or to instruct the Hospital's medical and/or nursing staff to take precautions to prevent any or any further trauma to the spinal cord of the deceased;

(v) failed to prevent and/or arrest the said deceased's bodily systems from going into severe shock and consequently failing to prevent the occurrence of a cardio respiratory arrest;

(vi) left the deceased unattended at times.

So there is no departure. And there can be no ground for complaint that either defendant has been taken by surprise.

[5] The first defendant's answer to the charges of negligence made against her is as follows. She was on duty at Casualty when the deceased was brought in. She attended to him. She examined him. She found that although a little drowsy, he was conscious and able to speak rationally. From questions she put to him, she discovered that he had consumed a large quantity of an alcoholic beverage the night before. His breath smelt of alcohol and he had blood shot eyes. Her examination of the deceased revealed the following. He had a heart rate of 100/min and blood pressure of

100/60 mmHg. There was a 5 cm laceration over his frontal bone and a linear bruise over his left lower chest. He was able to move his right leg, but he had a tender left hip which gave him pain when he moved it. The first defendant noted these observations in exh. D4 and the document at p. 13A of the agreed bundle of documents. She then took the following steps to treat the deceased. First, she instructed the medical assistant on duty to clean the forehead wound and bandage it. Next, she started the deceased on a maintenance intravenous drip of Hartmann's solution. This was done to replace blood loss from his wound. Lastly, she directed x-rays of the skull, chest, abdomen, pelvis and left femur.

[6] Central to the plaintiffs' case is the charge that the first defendant ought reasonably to have suspected a spinal injury and directed treatment accordingly. Now, to arrive at that point it must first be established by evidence that the deceased did suffer a spinal injury. But there is not a jot of evidence that establishes the point. It is merely a theory advanced by the plaintiffs. Instead, the plaintiffs have attacked the theory advanced by the defendants' as to the likely cause of the deceased's death seeking thereby to show that their charge of negligence must be correct. That, in my considered judgment, is insufficient.

[7] Additionally, there is evidence on record to show that the deceased, on admission, found it painful to move one of his legs. The evidence of DW13 (Dato' Dr. Mohd Rani bin Jusuh, a neurologist and Head of the second defendant's Department of Neurology) is that the first defendant did conduct an examination of the central nervous system. Even if the evidence of the witnesses produced by the defendants is to be looked upon with suspicion – and I hasten to add that I do not suggest that it should be so treated – the plaintiffs' case on negligence as against the first defendant remains unproved.

[8] I now turn to the plaintiffs' case against the second defendant. It is premised on two grounds. First, that upon a finding of negligence against the first defendant, the second defendant is vicariously liable as her employer. Second, on the facts the second defendant was guilty of negligence in not providing any adequate or competent medical care for the management and treatment of the deceased. Further, it had in operation, the existence of a negligent system of medical care and attention in the Casualty Department of the hospital.

[9] The evidence on which the plaintiffs rely to support the charge of negligence against the second defendant is as follows. After the first defendant had concluded her examination, the deceased was wheeled to the x-ray department on the first floor of the hospital by DW4, a hospital attendant and DW5, an assistant nurse. This is because the x-ray machine in the Casualty unit had broken down. The deceased was left unattended at the door leading to the x-ray department. Between 7.35am to 7.40am, PW1, PW2 and PW3 came to the x-ray department. They saw the deceased lying unattended on a trolley outside the x-ray room. PW1 saw that the deceased had a cut over his left eye with blood on his singlet. He also noticed that the deceased's legs were cold and at an outward angle. The drip that had been introduced at Casualty had run dry before the deceased was wheeled in for the xrays. At about 8.30am. PW4 could not feel the pulse of the deceased and called for a doctor. DW9, Dr. Balbir arrived and attended to the deceased. This was the first time that the deceased was attended to by a doctor after the first defendant had conducted her examination. DW9 put the deceased on a head chart to monitor his conscious level and the dilation of his pupils. DW9 also referred the deceased to the neurosurgical unit immediately and put him on a blood pressure chart quarter hourly to monitor his vital signs. The plaintiffs say that these steps taken by DW9 were the first acts of monitoring the deceased since his arrival at the hospital. The deceased was put on an intravenous regime containing Hartmann's solution to combat low blood volume subsequent to any blood loss. These intravenous interventions were administered at 8.45am, that is to say, two hours after the deceased arrived at the hospital. Shortly before 9am Dr Hatta (DW10) of the neurosurgical department arrived and attended to the deceased. By the time he arrived, the deceased, according to DW10 needed urgent or immediate treatment After an examination, DW10 found that the deceased could not move both his legs, that there was a sensory reduction from thoracic vertebral No. 8 downwards and that there was an absence of plantar reflex. DW10's provisional diagnosis of the deceased was "cerebral concussion with ?spinal shock". DW10 immediately administered a series of treatment including a haemacel solution to compensate for a low volume of blood. At about 9.10am the deceased had a cardio respiratory arrest. Attempts to resuscitate him failed and the deceased was pronounced dead at about 10am. It is the plaintiffs' case that the foregoing facts fairly support a charge of negligence against the second defendant.

[10] In my judgment, like the case against the first defendant, the plaintiffs' case against the second defendant must, to succeed, depend upon proof of causation. Taking into account all the facts alluded to in the previous paragraph of this judgment and giving them the maximum weight they deserve, the plaintiffs still fall short of establishing that the negligence – if any – on the part of the second defendant caused the deceased's death.

[11] Of course, I accept that a case of medical or other type of negligence may be proved by inference from proved facts. *McGhee v. National Coal Board* [1972] 3 All ER 1008 demonstrates that. It was a case that charged negligence against an employer for failing to provide a safe system of work. The pursuer worked in a brick kiln. The hot and dusty conditions of his work place caused the brick dust to adhere to his sweaty skin. No breach of duty by his employers, the defenders, was established in respect of his working conditions. However, the employers were held to be at fault in failing to provide adequate washing facilities which resulted in the pursuer having to cycle home after work with his body still caked in brick dust. The pursuer contracted dermatitis and the evidence that this was caused by the brick dust was accepted. Brick dust adhering to the skin was a recognized cause of industrial dermatitis, and the provision of showers to remove it after work was a usual precaution to minimize the risk of the disease. The precise mechanism of causation of the disease however, was not known and the furthest the doctors called for the pursuer were able to go was to say that the provision of showers would have materially reduced the risk of dermatitis. They were unable to say that it would probably have prevented the disease.

[12] The pursuer failed before the Lord Ordinary and the First Division of the Court of Session on the ground that he had not proved causation. On further appeal, the House of Lords reversed. Lord Wilberforce said (at p 1012):

> But the question remains whether a purser must necessarily fail if, after he has shown a breach of duty, involving an increase of risk of disease, he cannot positively prove that this increase of risk caused or materially contributed to the disease while his employers cannot positively prove the contrary. In this intermediate case there is an appearance of logic in the view that the pursuer, on whom the onus lies, should fail – a logic which dictated the judgments below. The question is whether we should be satisfied in factual situations like the present, with this logical approach. In

my opinion, there are further considerations of importance. First, it is a sound principle that where a person has, by breach of duty of care, created a risk, the loss should be borne by him unless he shows that it had some other cause. Secondly, from the evidential point of view, one may ask, why should a man who is able to show that his employer should have taken certain precautions, because without them there is a risk, or an added risk, of injury or disease, and who in fact sustains exactly that injury or disease, have to assume the burden of proving more: namely, that it was the addition to the risk, caused by the breach of duty, which caused or materially contributed to the injury? In many cases of which the present is typical, this is impossible to prove, just because honest medical opinion cannot segregate the causes of an illness between compound causes. And if one asks which of the parties, the workman or the employers should suffer from this inherent evidential difficulty, the answer as a matter in policy or justice should be that it is the creator of the risk who, ex hypothesi, must be taken to have foreseen the possibility of damage, who should bear its consequences.

[13] Be it noted that Lord Wilberforce treated the equivocal medical evidence in that case as having no bearing in the proof of causation because policy or justice requires that an inference of negligence be drawn against the creator of the risk. But the case here comes nowhere near McGhee. The defendants' did not create any risk. Therefore, the primary burden of proving causation lay on the plaintiffs. In my judgment the present case is closer to *Wilsher v. Essex Area Health Authority* [1988] 1 All ER 860 although it does differ in a material respect to which I shall advert shortly. There, the plaintiff, an infant, was prematurely born. He suffered from various illnesses including oxygen deficiency. A catheter was twice inserted into a vein of the plaintiff rather than an artery. On both occasions the plaintiff was given excess oxygen. The plaintiff was later discovered to be suffering from an incurable condition of the retina resulting in near blindness. The plaintiff's retinal condition could have been caused by excess oxygen, but it also occurred in premature babies who were not given oxygen but who suffered from five other conditions common in premature babies, and all of which had afflicted the plaintiff. The plaintiff brought an action against the health authority claiming damages for negligence and alleging that the excess oxygen in his bloodstream had caused his retinal condition. The medical evidence led at the trial was inconclusive whether excess oxygen had caused or materially contributed to the

plaintiff's retinal condition. The trial judge held for the plaintiff on the ground that Hospital had failed to take proper precautions to prevent excess oxygen being administered to the plaintiff. He went on to hold that the burden lay on the health authority to show that there was no breach of duty, as well as showing that the damage did not result from the breach. The Court of Appeal affirmed his decision. The defendant health authority then appealed further and the House of Lords reversed. Lord Bridge, after reviewing several authorities on the topic of causation said (at p 881):

> The conclusion I draw from these passages is that *McGhee v. National Coal Board* laid down no new principle of law whatever. On the contrary, it affirmed the principle that the onus of proving causation lies on the pursuer or plaintiff. Adopting a robust and pragmatic approach to the undisputed primary facts of the case, the majority concluded that it was a legitimate inference of fact that the defender's negligence had materially contributed to the pursuer's injury. The decision, in my opinion, is of no greater significance than that and the attempt to extract from it some esoteric principle which in some way modifies, as a matter of law, the nature of the burden of proof of causation which a plaintiff or pursuer must discharge once he has established a relevant breach of duty is a fruitless one.

[14] In a later passage Lord Bridge said this:

> Since, on this view, the appeal must, in any event, be allowed, it is not strictly necessary to decide whether it was open to the Court of Appeal to resolve one of the conflicts between the experts which the judge left unresolved and to find that the oxygen administered to Martin in consequence of the misleading PO2 levels derived from the misplaced catheter was capable of having caused or materially contributed to his RLF. I very well understand the anxiety of the majority to avoid the necessity for ordering a retrial if that was at all possible. But, having accepted, as your Lordships and counsel have and to accept, as your Lordships and counsel have had to accept, that the primary conflict of opinion between the experts whether excessive oxygen in the first two days of life probably did cause or materially contribute to Martin's RLF cannot be resolved by reading the transcript, I doubt, with all respect, if the Court of Appeal was entitled to try to resolve the secondary conflict whether it could have done so. Where expert witnesses are radically at issue about complex technical questions within their own field and are examined and cross-examined at length about their conflicting

A theories, I believe that the judge's advantage in seeing them and hearing them is scarcely less important than when he has to resolve some conflict of primary fact between lay witnesses in purely mundane matters. So here, in the absence of relevant findings of fact by the judge, there was really no alternative to a
B retrial. At all events, the judge who retries the issue of causation should approach it with an entirely open mind uninfluenced by any view of the facts bearing on causation expressed in the Court of Appeal.

To have to order a retrial is a highly unsatisfactory result and one
C cannot help feeling the profoundest sympathy for Martin and his family that the outcome is once again in doubt and that this litigation may have to drag on. Many may feel that such a result serves only to highlight the shortcomings of a system in which the victim of some grievous misfortune will recover substantial compensation or none at all according to the unpredictable hazards
D of the forensic process. But, whether we like it or not, the law, which only Parliament can change, requires proof of fault causing damage as the basis of liability in tort. We should do society nothing but disservice if we made the forensic process still more unpredictable and hazardous by distorting the law to accommodate
E the exigencies of what may seem hard cases.

[15] In my judgment, like the plaintiff in *Wilsher*, the plaintiffs here have clearly failed to establish causation. Earlier I did say that *Wilsher* differed from the present case in one respect. It is this. In
F *Wilsher* there was a sharp conflict in the medical evidence whereas in the present case that element is lacking. There is simply no evidence of a spinal injury. In *Wilshire* there was evidence of excessive oxygen having been administered and of the injury to the eye. Here, the plaintiffs' medical evidence put at its highest merely renders uncertain the proximate cause of the deceased's death.
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[16] There is one other point that must be addressed. The plaintiffs quite rightly rely on the recent decision of the Federal Court in *Foo Fiona v. Dr. Eddie Soo* [2007] 1 CLJ 229. In that case, the Federal Court held that the standard of care that a
H medical attendant should exercise is now a question which is for the ultimate consideration of the courts and no longer one for the medical profession alone to decide through a responsible body of medical opinion. While I must reserve my comments on the correctness of the decision on the actual facts of that case, it is
I one that is plainly binding on this court. But that apart, I do not see that it takes the plaintiffs any further in proving causation in this case.

[17] For the reasons already given, it is with much regret that I arrive at the conclusion that this appeal must fail. It is dismissed with costs. The orders of the High Court are affirmed. The deposit in court shall be paid out to the second defendant to account of its taxed costs. There shall however be admitted to taxation only one item for getting up here and in the court below.

[18] Before I conclude there is an observation that I must make. The events leading to the deceased's death in this case occurred some 23 years ago. It is a matter of pure amazement that it has taken this length of time for this case to reach us. If the law is to be castigated for its delays, then, this case surely proves the rule.

[19] My learned brothers, Suriyadi bin Halim Omar and Hasan bin Lah, JJCA have read this judgment in draft and have expressed their agreement with it.